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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1169

THE MASSMAN CONSTRUCTION COMPANY,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 57-62) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 8, 1945, and a motion for a new trial was overruled on March 5, 1945 (R. 63). The petition for a writ of certiorari was filed on April 16, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act

of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

A bidder on a Government contract, after unsuccessfully seeking modification or withdrawal of its bid because of an alleged mistake in the bid price, thereafter, under protest, signed, executed and performed the Government's contract and accepted payment at the bid price. It thereafter brought suit in the Court of Claims seeking reformation of the contract. The question presented is whether, in these circumstances, the court below properly refused to reform this contract because of the alleged mistake in the bid price.

STATEMENT

On October 23, 1940, the United States Engineer Office, New Orleans, Louisiana, invited bids for the furnishing of labor and performance of all work to repair the existing, rubble-mound, east jetty at Calcasieu Pass, Louisiana (R. 5–10, 43). The invitation stated that the "unit price bid for each item must allow for all collateral or indirect cost connected with it" (R. 8, 44). The invitation also required bidders to execute bid bonds with each bid (R. 6, 44), the bond to become "void and of no effect" if the bidder shall "enter into a written contract with the Government, in accordance with the bid as accepted" (R. 28–29). On November 7, 1940, petitioner filed its bid in the office of the District Engineer together with a bid

bond in the amount of $200,000 (R. 28–29, 50). The bids were opened on the same day, and petitioner's bid of $367,800 was the lowest of four submitted (R. 50).

On November 20, 1940, petitioner, by letter, notified the office of the United States Engineer at New Orleans that its bid had "unintentionally failed to include in [its] total cost the value of equipment rentals which should be charged against the job;" and that such rentals "which should have been added to [the] bid totaled $88,000." Admitting that the "fault was entirely" due to its own "oversight," petitioner requested that the $88,000 cost "be added to [its] bid before the contract is awarded," or, in the alternative, that its "bid be rejected," and the "bid bond be released without penalty to either the surety company or [it]" (R. 53).[1] On December 18, 1940, the District Engineer advised petitioner that its bid of $367,800 was accepted, that "after due con-

[1] The facts underlying petitioner's "oversight," and its subsequent disclosure, are set forth in detail in the Special Findings of Fact of the court below (Findings 4–16; R. 44–53). They may be briefly summarized as follows: Petitioner's bid was estimated and submitted by petitioner's general superintendent and chief estimator, George E. Owens. While computing the costs to be taken into consideration in the submission of a bid, Owens, through inadvertence, failed to remove from his brief case the cost sheet estimating equipment rentals at $88,000 (R. 46–50), and as a consequence, the final computation of the bid did not include this amount (R. 49). After the submission of the bid, Owens became concerned over its correctness, but attributed the error, if any, to poor

sideration" petitioner's request to change its "bid is denied," but that petitioner has "the right to file a claim with the District Engineer for submission through channels to the Comptroller Gen- [petitioner's] bid" ($367,800) (R. 54–55). On the ceipt of this letter, petitioner's officers "considered the advisability of declining to enter into the contract," and "the effect of the forfeiture of its [bid] bond." Considering, however, "as one of the main factors the effect which a failure to enter into the contract might have upon its relations with the Government," the petitioner decided to sign the contract (R. 54).[2]

Thereafter, on December 28, 1940, petitioner executed the contract to "furnish the plant, labor and perform the work" in accordance with the specifications set forth in the government's advertisement for bids, and at the "prices set out in [petitioner's] bid" ($367,800) (R. 54–55). On the same day, petitioner forwarded to the District Engineer, together with the contract, a written protest stating that it was signing the contract "under protest," and "reserving all of its rights * * *

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judgment (R. 51–52). Thereafter, the oversight was disclosed in a conference between Owens and petitioner's president and vice president (R. 52–53).

[2] The court below found that at the time petitioner executed the contract at the bid price, it "had considerable Government business and did not desire to injure its established good-will with the Government agencies with which it was dealing" (R. 54). The court also found that "During the past fifteen years," petitioner's contracts with the Government "have amounted to some $60,000,000" (R. 43).

and asking for relief on account of error and mistake in its bid" (R. 54–55). Petitioner enclosed in this letter a letter to the Comptroller General in which it prayed that "relief be given it in this matter by allowing it the reasonable rental value of said equipment so inadvertently overlooked in [its] bid" (R. 55). The District Engineer forwarded petitioner's letter to the Comptroller General (R. 55). Thereafter, petitioner's officials had conferences with the Corps of Engineers submitting affidavits and information in support of its claim (R. 55). On June 13, 1941, the Corps of Engineers forwarded petitioner's claim to the Comptroller General, finding "that there is doubt whether the [petitioner] did in fact make the mistake," that "the estimate was prepared in an extremely careless manner," that "it would not be unconscionable to require [petitioner] to perform the work at its bid price," that the "record does not establish that the [petitioner] would incur a loss in performing at the contract price," and recommending that the "claim be disallowed" (R. 55–56). The Comptroller General denied the claim (R. 56). Petitioner thereafter completely performed the contract and received payment at the contract price (R. 56).[3]

On October 15, 1942, petitioner filed a petition in the Court of Claims for "modification" of its contract with the United States "by the addition

[3] $100 was withheld from the petitioner because of its refusal to sign the final voucher (R. 56).

thereto of the sum of at least $88,000" (R. 5). That court entered judgment dismissing the petition, Judge Littleton dissenting without an opinion (R. 62–63).

ARGUMENT

It is settled law that where, because of mistake, the terms of a written contract are "materially at variance" with the intention of both parties to the contract, reformation will be allowed to reform the writing "so that it shall express the intention of the parties." *Restatement of Contracts*, § 504. In the absence of the "fraud or misrepresentation of one" of the parties to the contract (*id.* § 491),[4] the "mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended." *Hearne* v. *Marine Insurance Company*, 20 Wall. 488, 490–491. Following these basic principles, the court below refused reformation of petitioner's contract because there was no element of "mistake" present at the time petitioner signed its contract with the Government, for both petitioner and the Government had by then become aware of petitioner's mistake in the bid (R. 60). Petitioner contends, however, that the element of mutual "mistake" was inherent in the executed contract, since the contract "was signed under written protest, and primarily

[4] Petitioner does not contend that the Government was guilty of fraud or misrepresentation. And the mistake was not a patent one; see note 7, p. 11, *infra*.

because the petitioner realized that its failure to do so would work a forfeiture of its bid bond" (Pet. 13; see also Pet. 15, 19). We submit that the facts of this case and the applicable rules of law make these contentions untenable.

The undisputed findings of fact of the court below make it clear that there was no element of mistake—a "state of mind that is not in accord with the facts" (*Restatement of Contracts*, § 500)—present at the time the petitioner executed its contract with the United States. At that time, the alleged "oversight" (R. 53) of petitioner's chief estimator and general superintendent, George E. Owens, was known to petitioner's officers and had been made known to the Government (Findings 15–18; R. 52–54). Petitioner had sought modification or withdrawal of its bid, and the Government had "after due consideration" refused petitioner's request (Findings 16, 17; R. 53–54). With knowledge of the alleged "oversight" and the Government's position in respect thereto in mind, petitioner elected not to rescind its bid, but to sign and execute the contract with the United States at the bid price (Finding 18; R. 54). It is, therefore, clear that there was no element of mistake, either mutual or unilateral, present at the time of the signing and execution of the contract which would, of itself, now justify reformation.

Petitioner contends, however, that the "mistake" in its bid inhered in the executed contract,

since it signed that contract "primarily because the petitioner realized that its failure to do so would work a forfeiture of its bid bond" (Pet. 13).[5] This is but another way of asserting that the contract was signed under duress. But it is clear that petitioner's liability on the bid bond was litigable (*Moffet, Hodgkins, etc. Co.* v. *Rochester,* 178 U. S. 373) and may not be made a basis for imputing "inequitable conduct" to the Government (Pet. 12) or for contending that the contract was executed conditionally or under duress (Pet. 13). The courts have consistently held that where one is entitled to litigate, there is no duress or unconscionable conduct justifying rescission or reformation of the transaction allegedly induced thereby. *E. g., Board of Trustees, etc.* v. *O. D. Wilson Co.,* 133 F. 2d 399 (App. D. C.); see also cases cited in *Williston on Contracts* (Rev. Ed., 1937), § 1606. As the court

[5] It is extremely doubtful if the record will support this contention. The court below found that in "reaching a decision to sign the contract" at the bid price, petitioner "considered the effect of the forfeiture of its bond and also as one of the main factors the effect which a failure to enter into the contract might have upon its relations with the Government. At that time [petitioner] had considerable Government business and did not desire to injure its established good-will with the Government agencies with which it was dealing" (Finding 18; R. 54). The court below, in its opinion, also observed the "factor" of petitioner's "potential liability" on its bid bond "was not, apparently, the dominant one in arriving at the decision to sign. The dominant factor, it may be inferred from the testimony of [petitioner's] official, was the desire of the [petitioner] to keep the good will of its best customer" (R. 61).

below stated, the "insistence" of the Government in refusing to reject or modify petitioner's bid "put the [petitioner] in the position where it had to make up its mind whether it would be wiser to refuse to sign the contract and contest by litigation its liability on the bond, or to sign the contract, keep its reputation clear with the Government and seek relief through the discretionary action of higher officials," and did not make the Government's position unconscionable (R. 62). In other words, petitioner "simply chose to contract and perform rather than have its right to rescind [the bid] judicially determined. It is bound by the contract and cannot recover * * *" (*Board of Trustees, etc.* v. *O. D. Wilson Co.*, 133 F. 2d at p. 400). In such circumstances, it "is elementary" that "one who merely performs his contract can recover merely the contract price" (*ibid;* see also *Hawkins* v. *United States*, 96 U. S. 639).[6]

Nor did petitioner's execution of the contract "under written protest" (Pet. 13, 15, 19) because

[6] *Hearne* v. *Marine Insurance Co.*, 20 Wall. 488 (Pet. 15, 18), *Moffett, Hodgkins, etc. Co.* v. *Rochester*, 178 U. S. 373 (Pet. 15–18, 20–21), *Board of School Commissioners of City of Indianapolis* v. *Bender*, 36 Ind. App. 164 (Pet. 19, 22–23) and *Edward A. Dunn* v. *P. D. O'Mara*, 70 Ill. App. 609 (Pet. 21–22), relied upon by petitioner, are not in point. In the *Hearne* case, this Court refused reformation because the "circumstances" showed that there was "no mistake nor misapprehension" at the time the parties executed their contract (20 Wall. at p. 491). In the *Moffett* and *Board of School Commissioners* cases, it was held that one filing a bid at the

of the "mistake" in its bid price add anything to its rights to subsequent reformation, absent mutual mistake or duress. Petitioner, having chosen not to rescind its bid, conceivably voidable if made

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invitation of a governmental agency, which bid was based on mistake, could withdraw the bid upon the discovery of the mistake, and no contracts were thereafter executed. In the *Dunn* case, the mutual mistake was disclosed after the contract was executed, and the court specifically found that the words of the contract did not express the true intention of the parties.

Petitioner's assertion (Pet. 14, 23–24) that the decision of the court below is in "conflict" with its decisions in *Hygienic Fibre Co.* v. *The United States*, 59 C. Cls. 598, *Poole Engineering & Machine Co.* v. *The United States*, 58 C. Cls. 9, *Edmund J. Rappoli Co.* v. *The United States*, 98 C. Cls. 499, and *Edwin Dougherty, etc.* v. *The United States*, No. 45856, decided October 2, 1944, is without merit. In the *Hygienic Fibre* case, reformation of a cost-plus contract was allowed, but the court specifically found that the "prices stipulated" by the parties "were not intended to be conclusive" (59 C. Cls. at pp. 607–608). In the *Poole* case, reformation was allowed because, at the time of the contract's execution, both parties to the contract understood the obligations of each thereunder to be different from those stated in the written instrument. In the *Edmund J. Rappoli* case, an allegedly erroneous bid was submitted by a Government contractor, but the contractor was persuaded by Government officers to sign the contract at the bid price on the assurance "that the mistake could be corrected by going through a routine," and that "when the routine was finished [the contractor] would receive what it was entitled to" (98 C. Cls. at p. 516). The court treated the assurance as an integral part of the contract, and reformation was made to conform to the understanding of the parties. In the *Dougherty* case, the court denied the contractor relief, stating that "upon acceptance" of the bid by the Government, the contractor "became obligated to do the work for the amount bid" (p. 11 of slip-sheet opinion).

under duress or based on a mistake of fact (*Williston on Contracts* (Rev. Ed., 1937), §§ 15, 1626), elected to contract with the United States at its bid price (Findings 18, 19; R. 54–55), and thus terminated any right to reformation thereof. See *Restatement of Contracts,* § 431 (comment g); *Williston, supra,* § 1528; cf. *Restatement of Restitution,* § 68.[7] As the court

[7] In this respect, it is significant to note that, after the opening of the bids which disclosed petitioner's to be the lowest of four submitted, petitioner's chief estimator and general superintendent, George E. Owens, conferred with the District Engineer in regard to the performance of the project. At that time, neither the District Engineer nor his assistant, both of whom were experienced estimators, regarded petitioner's bid as erroneous or unconscionably low. Indeed, the bid was not substantially different from bids submitted some sixteen months earlier for similar work in the same area (Finding 14; R. 51–52). Thereafter, neither the District Engineer, the Corps of Engineers, nor the Comptroller General found petitioner's bid unconscionable (Findings 17, 20, 21; R. 53–54, 55–56). In fact, the Corps of Engineers, after considering affidavits and supporting data submitted by petitioner, found that "there is doubt" as to whether petitioner did "in fact make the mistake" and that the "present record does not establish that [petitioner] would incur a loss in performing at the contract price" (Finding 20; R. 56). Petitioner nowhere alleges that it actually incurred a loss in executing the contract. Since it is "firmly established" that it is not sufficient to establish the facts upon which reformation of a contract is sought "by a mere preponderance of the evidence, but the proof thereof must be of the clearest and most satisfactory character—proof that is plain and convincing beyond reasonable controversy" (*Firemen's Ins. Co.* v. *Lasker*, 18 F. 2d 375, 378 (C. C. A. 8); see also *Philippine Sugar, etc. Co.* v. *Philippine Islands*, 247 U. S. 385, 391), there is substantial doubt whether the facts of this case would have even supported reformation of petitioner's

stated in *Board of Trustees, etc.* v. *O. D. Wilson Co.*, 133 F. 2d 399, 400 (App. D. C.), where, as here, the contractor executed the contract in accordance with the bid price, but " 'reserving' all rights arising from its estimator's mistake," petitioner "could not on any theory contract, perform, collect the full contract price, and then repudiate the contract and recover as if there had been none. It could not acquire such a right by purporting to 'reserve' it." To allow petitioner relief in these circumstances would, in the words of the court below, "be making for the parties the very contract which one of them, the Government, expressly refused to make * * *, though requested to do so by the [petitioner]" (R. 60).[8]

bid, had it chosen not to sign and execute the contract at the bid price. Clearly, therefore, they are not sufficient to support reformation of an executed contract, entered into after such facts were disclosed to both parties to the contract.

[8] Petitioner also argues (Pet. 19) that although it believes "the mistake here was mutual," the "petition and arguments below sought, in the alternative, a rescission of this contract so that if [this] Court should believe that the mistake was unilateral," relief should be granted in accordance with the rule that a "mistake on one side may be ground for rescinding, but not for reforming, a contract." Although the petitioner in the court below only sought "modification" of its contract with the Government (R. 5)—which can hardly be characterized as rescission—it is clear that the instant case is not one in which petitioner could seek rescission. Where a right to rescission exists, it is terminated by an election to proceed with the contract, and by an acceptance of benefits thereunder. *Ford Motor Co.* v. *Pearson*, 40 F. 2d 858, 863 (C. C. A. 9); see also *Connolly* v. *Bouck*, 174 Fed. 312 (C. C. A. 8); *Restatement of Contracts*, §§ 484, 510.

CONCLUSION

The decision below is correct and no conflict exists. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945